Lin Tong Hai v Realkey Solutions Technologies Sdn Bhd

HIGH COURT (JOHOR BAHRU) — COMPANIES WINDING UP PETITION NO JA-28NCC-194–09 OF 2016
COLLIN SEQUERAH JC
11 JANUARY 2017

Companies and Corporations — Winding up — Appeal against winding up — Whether appeal filed against judgment amounted to a stay — Whether procedure adopted by petitioner in winding up petition in order — Whether statutory notice duly served — Companies Act 1965 s 218

This was an appeal against the decision of the court in allowing a winding up petition brought by the petitioner against the respondent. The petitioner was a Chinese national while the respondent was a company registered in Malaysia. The petitioner obtained a summary judgment from the Malacca Sessions Court dated 17 June 2016. Pursuant to that, the petitioner issued a statutory notice dated 27 July 2016 under s 218 of the Companies Act 1965 ('the Act'). The total judgment sum due and owing until 21 July 2016 was RM791,102.12 as per the judgment obtained on 17 June 2016. The petitioner duly served said petition on the respondent but the respondent failed to settle the sum due and owing. In their affidavit in reply to the petitioner's affidavit in support, the respondent challenged the petition, inter alia, on the grounds that they filed a notice of appeal to the Malacca High Court against the judgment obtained by the petitioner in the sessions court. The respondent submitted that they were disputing the judgment. The respondent deposed that the appeal was still pending and that there was no proof that the petitioner had made any capital advances to the respondent as alleged. The respondent also disputed the receipt of the statutory notice.

Held, allowing the petition with costs:

(1) The winding up petition was filed based on a judgment dated 17 June 2016 for the sum of RM796,000 as at 6 September 2016, which the respondent failed to settle. As the respondent failed to pay the balance amount owing to the petitioner, this triggered the presumption under s 218(2)(a) of the Act that the respondent was unable to pay its debts. In the respondent's affidavit, there was no documentary evidence to show that it was able to pay its debts and is in fact solvent. Therefore, the respondent failed to rebut the presumption and was deemed unable to pay its debts (see para 17).

(2) The petitioner had proven service, inter alia, upon the last known registered address of the respondent. On the available evidence, the

relevant notice papers have been duly served on the respondent and the mode was in accordance with provisions of s 218(2)(a) of the Act (see para 19).

(3) The procedure adopted by the petitioner with regards to the presentation of the winding up petition was in order and in compliance with procedure. Filing of an appeal does not amount to an automatic stay. There was no formal application made by the respondent and neither was there any injunction to prevent the winding up petition from being heard. The fact that there was a pending appeal but no stay of execution did not make any difference to the validity of the petition. The petition should be allowed as there was sufficient evidence to show that the respondent was insolvent and unable to pay its debts (see paras 21 & 23).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan mahkamah dalam membenarkan petisyen penggulungan dimulakan oleh pempetisyen terhadap responden. Pempetisyen ialah warganegara Cina manakala responden adalah syarikat yang didaftarkan di Malaysia. Pempetisyen telah memperoleh penghakiman terus daripada Mahkamah Sesyen Melaka bertarikh 17 Jun 2016. Berikutan itu, pempetisyen telah mengeluarkan notis statutori bertarikh 27 Julai 2016 di bawah s 218 Akta Syarikat 1965 ('Akta tersebut'). Keseluruhan jumlah penghakiman yang kena dibayar dan terhutang sehingga 21 Julai 2016 adalah RM791,102.12 sepertimana penghakiman yang diperoleh pada 17 Jun 2016. Pempetisyen yang telahpun disampaikan petisyen tersebut ke atas responden tetapi responden telah gagal untuk menyelesaikan jumlah yang kena dibayar dan terhutang. Dalam afidavit jawapan mereka kepada afidavit sokongan pempetisyen, responden mencabar petisyen itu, antara lain, atas alasan bahawa mereka telah memfailkan notis rayuan kepada Mahkamah Tinggi Melaka terhadap penghakiman yang diperoleh oleh pempetisyen dalam mahkamah sesyen. Responden berhujah bahawa mereka mempertikaikan penghakiman. Responden memutuskan bahawa rayuan masih belum selesai dan bahawa tidak terdapat bukti yang pempetisyen telah membuat apa-apa pendahuluan modal kepada responden seperti yang dikatakan. Responden juga mempertikaikan penerimaan notis statutori.

Diputuskan, membenarkan pempetisyen dengan kos:

(1) Petisyen penggulungan telah difailkan berdasarkan penghakiman bertarikh 17 Jun 2016 untuk jumlah RM796,000 sehingga 6 September 2016, yang mana responden telah gagal untuk menyelesaikannya. Oleh kerana responden telah gagal untuk membayar baki jumlah terhutang kepada pempetisyen, ini mencetus andaian di bawah s 218(2)(a) Akta tersebut bahawa responden tidak dapat membayar hutangnya. Dalam afidavit responden, tiada keterangan dokumentar yang menunjukkan bahawa ia boleh membayar hutangnya dan sememangnya solven. Oleh

demikian, responden telah gagal untuk mematahkan andaian itu dan dianggap tidak boleh membayar hutangnya (lihat perenggan 17).

(2) Pempetisyen telah membuktikan penyampaian, antara lain, di alamat berdaftar terakhir responden yang diketahui. Berdasarkan keterangan sedia ada, kertas notis yang relevan telahpun disampaikan ke atas responden dan cara yang menurut peruntukan s 218(2)(a) Akta tersebut (lihat perenggan 19).

(3) Prosedur yang diguna pakai oleh pempetisyen berkaitan pembentangan petisyen penggulingan adalah bagi tujuan dan mematuhi prosedur. Pemfailan rayuan tidak merupakan penggantungan automatik. Tiada permohonan rasmi yang dibuat oleh responden dan tiada apa-apa injunksi untuk menghalang petisyen penggulungan daripada didengar. Fakta terdapat rayuan yang belum selesai tetapi tiada penggantungan pelaksanaan tidak merupakan apa-apa perbezaan kepada kesahan petisyen itu. Petisyen itu patut dibenarkan kerana terdapat keterangan yang mencukupi untuk menunjukkan bahawa responden adalah tidak solven dan tidak dapat membayar hutangnya (lihat perenggan 21 & 23).]

Notes

For cases on appeal against winding up, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1270–1278.

Cases referred to

Geopancar Sdn Bhd v Visage Engineering Sdn Bhd [2012] MLJU 850, HC (refd)

Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 5 MLJ 34; [2010] 1 LNS 360, CA (refd)

Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95, SC (refd)

Visage Continental Sdn Bhd v Smooth Track Sdn Bhd [2008] 1 MLJ 101, CA (refd)

Wayang Tinggi Produksi Sdn Bhd v Aficionado Media (M) Sdn Bhd [2013] 9 MLJ 122, HC (refd)

Legislation referred to

Companies Act 1965 s 218, 218(1)(e), (2)(a)

Zuraini (Jolin with her) (HS Chew) for the petitioner.
Umi Kalsom bt Abu Bakar (Harrison Raz & Kal) the respondent.

Collin Sequerah JC:

INTRODUCTION

[1] This was an appeal against the decision of this court on 24 October 2016 in allowing a winding up petition brought by the petitioner against the respondent. Having refused the request of learned counsel for the respondent for a postponement and a stay of the hearing of the petition, I gave order in terms of the petition. The respondent, being aggrieved, has filed this appeal.

BACKGROUND FACTS

[2] The petitioner is a Chinese national while the respondent is a company registered in Malaysia. The petitioner obtained a summary judgment dated 17 June 2016 in the Malacca Sessions Court vide Summons No B52 NCvC-31–11 of 2016 against the respondent on 6 September 2016.

[3] Pursuant to that, the petitioner issued a statutory notice under s 218 of the Companies Act 1965 dated 21 July 2016, inter alia, for the following:

(a) a balance sum of an advance of capital made by the petitioner to the respondent for sales and supply of LED lights and 36 units of energy saving devices for KFC and Pizza Hut outlets until 11 September 2015 plus interest amounting to RM358,967.48 pursuant to an agreed joint venture between the petitioner and the respondent;

(b) interest on the sum of RM358,967.48 at the rate of 5%pa from 12 September 2015–21 July 2016 of RM15,413.24 and continuing;

(c) division of 50% share of profits belonging to the petitioner derived from the said sales and supply of LED lights and 36 units of energy saving devices for KFC and Pizza Hut outlets pursuant to the said agreed joint venture sales and supply project as at 21 August 2015 plus interest amounting to RM393,002.23;

(d) interest on the sum of RM393,002.23 at the rate of 5%pa from 22 August 2015–21 July 2016 of RM18,005.17 and continuing; and

(e) costs of RM5,714.

[4] The total judgment sum due and owing until 21 July 2016 was therefore RM791,102.12 as per the judgment obtained on 17 June 2016 above.

[5] The petitioner duly served the said petition on the respondent but the respondent had failed to settle the sum due and owing.

ANALYSIS AND DECISION

[6] The respondent in their affidavit in reply to the petitioner's affidavit in support, had challenged the petition, inter alia, on the ground that they had filed a notice of appeal ('appeal') to the High Court at Malacca against the judgment obtained by the petitioner on 17 June 2016 ('the said judgment') at the Malacca Sessions Court. They submitted that they were thus disputing the judgment.

[7] They also deposed that the appeal is still pending. Among the grounds the respondent's submit will be raised at the hearing of the appeal is that the said joint venture arrangement between the petitioner and the respondent was unstamped and was cancelled by both parties and had no further effect.

[8] They also deposed that there was no proof that the petitioner had made any capital advances to the respondent as alleged. They further disputed the receipt of the statutory notice dated 21 July 2016 pursuant to s 218(1)(e) of the Companies Act 1965.

[9] The petitioner on the other hand, in their petition, stated that they had obtained a regular judgment of a total sum of RM791,102.12 against the respondent pursuant to Malacca Sessions Court Summons No B52 NCvC-31–11 of 2016 on 17 June 2016.

[10] The petitioner stated that pursuant to this, through their solicitors, they issued and served a statutory notice dated 21 July 2016 pursuant to s 218(1)(e) of the Companies Act 1965 together with a cover letter dated 21 July 2016 which was served by way of personal service at the last known registered address of the respondent. In addition they also stated that they served the said statutory notice on the address of a director of the respondent by leaving the said notice with a Malay gentleman in front of the premises of the said address. The said statutory notice carried with it the notification that the said sum of RM791,102.12 with interest was to be paid within 21 days of the service of the said statutory notice which was on 21 July 2016.

[11] They submitted that despite the fact that 21 days had elapsed, the said judgment sum had still not been paid and still remains due and outstanding. The petitioner also stated that up to the time of the service of the statutory notice, the respondent had not disputed the judgment sum.

The law on winding up

[12] The petitioner has filed this winding up petition premised on the provisions of ss 218(1)(e) and 218(2)(a) of the Companies Act 1965

respectively which reads as follows:

> 218 Circumstances in which company may be wound up by Court
>
> (1) The Court may order the winding up if —
>
> (e) the company is unable to pay its debts
>
> Definition of inability to pay debts
>
> (2) A company shall be deemed to be unable to pay its debts if —
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor

[13] According to the case of *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95, prima facie a creditor who has not been paid has the right to file a petition for winding up whatever its other motives may be. See also *Wayang Tinggi Produksi Sdn Bhd v Aficionado Media (M) Sdn Bhd* [2013] 9 MLJ 122.

[14] In the case of *Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd* [2010] 5 MLJ 34; [2010] 1 LNS 360, it was held:

> The test to ascertain commercial insolvency is rather simple. It is this. That the company is unable to meet the current debts as they fall due. And such a company may still be categorised as 'unable to pay its debts' even though the company has substantial wealth which cannot be realised immediately and even though on liquidation the company will be able to meet all its liabilities.

[15] In *Visage Continental Sdn Bhd v Smooth Track Sdn Bhd* [2008] 1 MLJ 101, the provision of s 218(2)(a) of the Companies Act 1965 was considered as follows:

> This provision has been judicially considered by our courts in several reported cases. Basically it is intended to provide for a creditor to present a petition for winding up of a company which is unable to pay its debt. *Prima facie proof of such inability is by way of service of the statutory notice or by some other proof of insolvency. Thus a creditor who has not been paid has the right to file a petition for winding up notwithstanding his motives for doing so* (see *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 96). *Failure of a company to pay as demanded would trigger the presumption that it is unable to pay its debt. But it is a rebuttal presumption in which the onus to rebut is upon the company to show that it is able to pay its debt* (see *PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd* [1995] 1 MLJ 21; *Re Lympne Investments Ltd* [1972] 1 WLR 523). (Emphasis added.)

[16] In *Visage Continental Sdn Bhd v Smooth Track Sdn Bhd*, it was further held:

> [31] If after being served with the statutory notice the company disputes the debt stated therein then it is for the court to consider on the evidence whether the dispute is bona fide before it can be said that the company is to be deemed unable to pay its debts and appropriate to be wound up.
>
> [32] It is to be noted that a dispute as to the precise amount owed would not be a sufficient answer to a petition if it can be established that the petitioner is a creditor for a sum which would otherwise entitle it to a winding up order (see *Re Tweeds Garages Ltd* [1962] 1 All ER 121).
>
> [33] But if the debt is disputed on substantial grounds and the circumstances are sufficient for the court to hold that the presentation of the petition is an abuse of process, the petitioner is either restrained from proceeding with the winding up or the petition is dismissed.
>
> [34] In considering the petition for winding up of a company on the ground that it is unable to pay its debt the court must act judiciously and should only consider the allegations contained in the petition and will not go beyond it (see *Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulic (M) Bhd* [1997] 5 MLJ 377; *Re Lundie Bros Ltd* [1965] 2 All ER 692).
>
> [35] Indeed, vague allegations in a petition or allegations which were so unsatisfactory as to amount to an abuse of the court would certainly entitle the court to strike out the petition in limine (see *Re WR Willcocks & Co Ltd* [1974] Ch 163; [1973] 2 All ER 93; *Re A Company* (1985) BCLC 37; [1974] 1 All ER 256; [1973] 1 WLR 1566).

[17] The said winding up petition was filed based upon a judgment dated 17 June 2016 for the sum of RM796,000.71 as at 6 September 2016. The respondent had failed to settle this amount. As the respondent had failed to pay the balance amount owing to the petitioner, this had triggered the presumption under s 218(2)(a) of the Companies Act 1965 that the respondent was unable to pay its debts. The respondent had not shown any documentary evidence in its affidavit that it was able to pay its debts and is in fact solvent. They have thus failed to rebut such presumption and are therefore deemed unable to pay its debts.

[18] The respondent also submits that it was unaware of the petition. In this regard, Justice Malik Ishak in the *Gulf*'s case said that:

> The demand that is required under s 218(2)(a) of the Companies Act 1965 can be in any form. There is no prescribed form to follow. So long as there is a notice of demand that is sufficient. The purpose of the notice is to warn the debtor, like the respondent here, of an impending petition (*Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313 (SC) at p 317). And the notice that is issued to the debtor must relate to a specified debt and that debt cannot be seriously questioned ...

[19] The petitioner had proven service, inter alia, upon the last known registered address of the respondent at No 16H, Jalan Sahabat, Kampung Melayu Majidee 81100 Johor Bahru, Johor and/or No 1F, Jalan Layang, Taman Perling, 81200 Johor Bahru Johor. This was evident from the affidavit of service by Ahmad Nor Salam bin Hj Wahee Anuar affirmed on 21 July 2016. On the available evidence I find that the relevant notice and papers have been duly served on the respondent. The above mode of service was in accordance with the provisions of s 218(2)(a) of the Companies Act 1965.

[20] On the date appointed for hearing of the winding up petition, the respondent requested for an adjournment which was strenuously objected to by the petitioner. The respondent submitted that as there was a pending appeal against the judgment obtained at the Malacca Sessions Court on 17 June 2016, the hearing of the petition ought not to proceed.

[21] It is trite however that the filing of an appeal does not amount to an automatic stay. There was no formal application for stay made by the respondent. Neither was there any injunction to prevent the winding petition from being heard. The procedure adopted by the petitioner in respect of the presentation of the winding up petition was in order and in compliance with procedure.

[22] An almost analogous position obtained in the case of *Geopancar Sdn Bhd v Visage Engineering Sdn Bhd* [2012] MLJU 850, as the following passage from the judgment shows:

> *Is the debt disputed?*
>
> [17] From the submissions of the Respondent, it may be summarised that *the Respondent is contending that it cannot be wound-up because the debt is genuinely disputed on the following grounds:*
>
> (a) *there is a pending application for leave to appeal against the judgment of the Court of Appeal* in respect of the S7 Suit; and
>
> (b) there is a cross-claim pleaded in the Kuala Lumpur Civil Suit No D22–1617 of 2009 or damages claim where the judgment of the High Court is pending appeal to the Court of Appeal.
>
> [18] *In short, the debt specified in the notice issued by the petitioner is disputed either because the judgment upon which the debt is founded is pending appeal before the Court of Appeal*; or there is a pending application for leave to appeal to the Federal Court. *The immediate concern is whether a judgment debt is or becomes a disputed debt when the related judgment is under appeal.*
>
> [19] *With respect, I believe the answer is quite obvious. It is not. Otherwise, all judgments are of or will have no effect until either the appeals are disposed of; or where there are no appeals, until the period for lodging an appeal has passed. This is regardless of whether the judgment involves an award for monetary compensation or not. This is*

entirely different from where there is an order for a stay of the execution of the judgment pending appeal. Where there is none, the effect of the order of Court is upon pronouncement.

[20] In *Pontian United Theatre Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd)* [2006] 2 MLJ 602, *the Court of Appeal considered precisely this point and it said:*

> *… A demand on a company under s 218(2)(a) may be made by 'a creditor … to whom the company is indebted in a sum exceeding five hundred ringgit then due'. A judgment for a sum establishes the debt, which then becomes due to the person to whom it is owed, who then becomes the creditor. The sum remains due even though the debtor's appeal against the judgment is pending, because an appeal does not operate as a stay of execution. The sum must be paid unless execution of the judgment has been stayed, in which event it is no longer due. In this case there was no stay of execution of the summary judgment. The sum was therefore due when the demand under s 218(2)(a) was made. By the appellant's failure to settle the demand for three weeks after it was made they were to be deemed to be unable to settle their debts, a circumstance which constituted one of the grounds on which the appellants could be wound up. The appeal on the first ground therefore fails.*

[21] In the present facts, we have an application pending leave to appeal to the Federal Court; and an appeal pending disposal before the Court of Appeal. In neither case is there a stay of execution of the order of the Court of Appeal or the High Court. In fact, the Court is advised that no application for stay has even been sought. For the purposes of the Petition, the position of the order of the Court of Appeal which is pending leave to appeal to the Federal Court is no different from the order of the High Court which is pending disposal of the Court of Appeal. A judgment debt arising from any judgment of the Court; be it the High Court or the Court of Appeal is still a debt. These orders of the High Court or Court of Appeal established the debt.

[22] *If there is no stay on the execution of any order of court, and subject to the terms of the order of court, the adjudged sum in the High Court as well as the sum confirmed or ordered by the Court of Appeal becomes due and owing to the petitioner upon pronouncement by the court. Where that adjudged sum is not paid up, then the respondent is deemed to be unable to settle its debts within the meaning of s 218(2)(a) of the Companies Act 1965. It is for the respondent to offer evidence of its solvency*. (Emphasis added.)

[23] The fact therefore that there is a pending appeal but no stay of execution does not make any difference to the validity this petition. I have considered the submissions and authorities of the parties and based on the above considerations and reasons I find that the petition should be allowed as there is sufficient evidence to show that the respondent was insolvent and unable to pay its debts.

[24] I therefore made the following orders:

(a) the respondent be wound up;

(b) the official liquidator ('Pegawai Penerima Malaysia') be appointed as liquidator; and

(c) costs of this petition be assessed and paid out of the assets of the respondent.

Petition allowed, with costs.

Reported by Nisha Paran